

**Sansla, Inc. and Laborers' International Union of
N.A. Local 17. Case 3-CA-19959**

February 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

On November 22, 1996, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Thomas J. Sheridan, Esq., for the General Counsel.
Eric C. Stuart, Esq. (Peckar & Abramson), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on September 30, 1996,¹ and October 8 in Albany and New York, New York, respectively. The complaint, which issued on May 22, and was based on an unfair labor practice charge that was filed on March 21 by Laborers' International Union of N.A. Local 17 (the Union), alleges that Sansla, Inc. (the Respondent), entered into a contract with the Union on February 22, but beginning in about March, Respondent ceased to abide by the terms of this contract and has unilaterally repudiated the terms of the contract, in violation of Section 8(a)(1)(5) of the Act.

¹ Unless indicated otherwise, all dates referred to relate to the year 1996.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS²

Respondent has been engaged as an asbestos abatement contractor in the building and construction industry, and obtained a contract to perform that work at the Orange County Residential Health Care Facility jobsite (the jobsite). Admittedly, on February 22, while at the jobsite, Respondent entered into a collective-bargaining agreement with the Union. While admitting that it entered into a contract with the Union on that date, the Respondent alleges that this contract was meant to cover only the jobsite and no other jobs that it subsequently obtained in the area. Counsel for the General Counsel alleges that this contract was not limited to the jobsite, and that by failing to abide by the terms of the contract at subsequent jobsites, Respondent violated Section 8(a)(1) and (5) of the Act. Testifying for the General Counsel was Lawrence Diorio, vice president and field representative for the Union. Testifying for the Respondent were Fred Moran, who, at the time, was Respondent's project manager at the jobsite and an admitted supervisor and agent of Respondent, and is presently self-employed; Lloyd Ambinder, who, at the time in question, was counsel to Respondent; and Chris Cole, who was project manager for Turner Construction Company (Turner), the construction manager at the jobsite.

There is an undated Project Labor Agreement between Turner and the Building and Construction Trades Council of Orange County covering the jobsite. This agreement states that it covers all successful bidders performing work at the jobsite, and that these bidders will recognize the appropriate signatory union as the exclusive bargaining representative of their craft employees performing work at the jobsite. The Union was one of the signatory unions to this agreement. On about December 12, 1995, Moran called the union office and asked them to send Respondent two laborers to work at the jobsite, and the Union did so. Over the entire period of Respondent's participation at the jobsite, the Union referred a total of seven or eight individuals to work for Respondent at the jobsite. Diorio testified that his shop steward at the jobsite informed him that Respondent was employing nonunion members at the jobsite and was paying benefits to the Union's funds only for union members. By letter to Respondent dated February 8, the Union's fund manager notified Respondent of these concerns, requested certain information, and scheduled an audit of Respondent's financial records.

Apparently, as a result of this letter, there was a meeting at the jobsite on February 21. Attending were Diorio and Jo-

² Counsel for the General Counsel's unopposed motion to correct transcript is granted.

seph Libonati, a field representative for the Union, Cole for Turner, and Ambinder and Moran for the Respondent. Diorio testified that during this meeting he alleged that Respondent was not abiding by the terms of the Project Labor Agreement and that he would like to resolve the problems without any legal problems or work stoppages, and at the conclusion of the meeting, the Union and Respondent agreed that the Respondent would pay certain specified benefits and travel expenses, and that Respondent "would be bound to our collective bargaining agreement." He testified further that nothing was said about the contract applying solely to the jobsite. By letter dated February 21 to Ambinder, Diorio wrote that at the meeting earlier that day the parties agreed to seven items. Items 1 through 3 provide for specified amounts to be paid to employees or the Union; item 4 states that the remaining work will be performed by union members; item 5 provides that Respondent will supply one named supervisor; and item 6 states: "A signed contract will be received by 2/23/96."

Diorio met with Moran at the union office on February 22. Diorio testified that he told Moran that the Union compromised on what it felt Respondent owed in order to develop a working relationship with the Respondent, and that Moran agreed to "sign a collective bargaining agreement for future work and work that he had ongoing at the time." There was no discussion at this meeting that the contract would apply solely to work at the jobsite, and Moran signed the contract at that time.

This contract is actually just a signature page to a building agreement between the Union and Construction Contractors Association of the Hudson Valley, Inc. (the Agreement), effective June 1, 1994, through May 31, 1997. The Agreement is a 56-page document, the first 18 pages of which spells out the jurisdiction of the Union. Article 1 of the Agreement, Recognition, states, *inter alia*:

The employer recognizes the Union as the sole collective bargaining agent for its employees concerning wages, hours and all other terms and conditions of employment in respect to the classification of work referred to in this Agreement.

On the signature page where Moran signed, agreeing to be bound by the terms of the Agreement, under his signature is a line for "title," and he listed General Manager, the next three lines are for company name, address and telephone number, and he wrote Respondent's name, its principal address in New Jersey, and its New Jersey telephone number. The bottom line (except for the date that the Agreement was signed) states: "Location of Job"; that was filled in by Moran as "Orange County Residential Health Care Facility."

Diorio testified that, in about March, he learned that the Respondent was working on two other projects within its jurisdiction—the Dutchess County Courthouse Annex and the Ferncliff Nursing Home in Rhinebeck—without complying with the terms of the Agreement. By letter to the Respondent dated March 13, Diorio notified them that they were in violation of the Agreement, threatening arbitration if they did not resolve the issue. By letter dated March 14, Moran responded that Respondent had not yet been awarded the contract for the Dutchess County Courthouse, but, if it did receive the contract, "it is Sansla's intent to use the most productive and

efficient work force for this intricate project." In this letter, Moran neither admitted nor denied that the Respondent was obligated under the Agreement for this other project, although in subsequent conversations with Diorio, Moran said that the contract only applied to the jobsite. Diorio testified that he subsequently learned that the Respondent worked on other projects within the Union's jurisdiction as well, but, again, refused to apply the terms of the Agreement to any of these projects.

In answer to questions from counsel for the Respondent, Diorio testified that he was aware that prior to its work on the jobsite the Respondent was a nonunion employer with its own work force. In addition, he testified that he is a trustee for the Union's benefit funds, and is aware that, under Federal law, in order to accept benefit fund contributions, a union must have a signed contract with the employer transmitting the funds. Diorio was asked whether, in about January, he had any conversations with Steven Krill or Cole of Turner in regard to his inability to cash the Respondent's benefit funds checks because of the lack of a contract with the Respondent. He initially answered no, and then answered yes.

Cole testified that, to his knowledge, the Respondent was the only nonunion contractor performing work at the jobsite. Beginning in about December 1995 he was contacted by Diorio with complaints about the Respondent. At first the complaints were that the Respondent was operating with nonunion employees and, later, the complaints were that the Respondent was not sending sufficient amounts to cover the fund payments for the employees at the jobsite and, that because the Union did not have a contract with the Respondent, it could not cash the benefit fund checks. He attended the February 21 meeting; the two issues discussed at this meeting were the Respondent's use of nonunion employees at the jobsite, and penalties that the Union was assessing against the Respondent for the use of nonunion employees at the jobsite. No other work projects were discussed at this meeting.

Ambinder testified that in about February he received a telephone call from Moran saying that the Respondent had been a successful bidder at the jobsite and then learned of the Project Labor Agreement that apparently required them to use union employees:

And the company was somewhat distressed. The company was a non-union company, didn't have any union—union employees, nor did it wish to hire any union employees . . . they were looking for a way to complete the job without having to put union employees on the job, somehow find a loophole around the PLA agreement.

At the February 21 meeting, the only issue discussed was the Respondent complying with the terms of the PLA agreement by employing union employees at the jobsite, and the jobsite was the only work project discussed at this meeting. As counsel to Respondent, he never agreed that Respondent would become a union contractor at any project other than the jobsite.

Moran testified that the Respondent's work commenced at the jobsite on about December 17, 1995; Respondent had transmitted some checks to the Union's benefit funds, and in

about mid-January, Diorio told him that the Union could not deposit the checks because it did not have a contract with the Respondent. At the February 21 meeting, it was "apparent" that the Respondent would have to enter into a contract with the Union because of the Project Labor Agreement. The only work project discussed at that meeting was the jobsite. At neither that meeting, nor the meeting the following day, did he agree that Respondent would be a union contractor for any project other than the jobsite. He testified that at the meeting of February 22, he told Diorio that the Respondent "is not interested in becoming a union contractor and will not be a union contractor, and that we would fight any attempts to become a union contractor." Diorio testified as a rebuttal witness that, after the February 21 meeting, he, Moran, and Libonati met and Moran said that Respondent had a job in Ferncliff "and he was going to use our people over there." When they met on the following day, they discussed other projects that the Respondent was performing work at. "And I stated to him that I think it would be a lot easier to work with us than go through all these headaches all the time. He then signed our collective bargaining agreement."

IV. ANALYSIS

The sole allegation is that, beginning in about March, Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to abide by the terms of its contract with the Union. Respondent, while admitting that it did not apply the terms of the Agreement to its other projects, defends that it was not bound to do so because the Agreement was only meant to apply to the jobsite. The General Counsel alleges that the Agreement is not so limited in its scope.

The Board has consistently refused to allow a party to use parole evidence of an alleged oral agreement to vary the terms of a written agreement. *Gollin Block & Supply Co.*, 243 NLRB 350, 352 (1979); *NDK Corp.*, 278 NLRB 1035 (1986). There is an exception to this, however; in *RPM Products*, 217 NLRB 855 (1975), in discussing an alleged contract, the Board stated: "sufficient ambiguity exists as to the scope of the unit covered to justify resort to parole evidence." See also *Teamsters Local 439*, 196 NLRB 971 (1972).

As stated in 30 Am. Jur. 2d § 1016 (1967):

The well-established general rule is that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation *without any uncertainty as to the object or extent of such engagement*, it is conclusively presumed that the entire engagement of the parties, and the extent and manner of their undertaking, have been reduced to writing, and all parole evidence of prior or contemporaneous conversations or declarations tending to substitute a new and different contract from the one evidence by the writing is incompetent. [Emphasis supplied.]

However, 30 Am. Jur. 2d § 1069 (1967):

Whenever the terms of a written contract or other instrument are susceptible of more than one interpretation, or an ambiguity arises, or the intent or object of the instrument cannot be ascertained from the language employed therein, parole or extrinsic evidence may be

introduced to show what was in the minds of the parties at the time of making the contract or executing the instrument, and to determine the object for or on which it was designed to operate.

The initial question is whether to allow parole evidence to establish what the parties intended to be the scope of the Agreement. In order to make this determination, I must initially determine whether there is uncertainty or ambiguities in the Agreement. The first 18 pages of the Agreement sets forth the work that the union members should be performing. In the recognition clause, article 1, the Agreement states, *inter alia*:

The employer recognizes the union as the sole collective bargaining agent for its employees concerning wages, hours and all other terms and conditions of employment in respect to the classification of work referred to in this Agreement.

No other provision in the Agreement describes the unit to be covered by the Agreement and the signature page states that the terms and conditions of employment shall be "binding upon the Employer named below." Moran signed for the Respondent, with the Respondent's principal office in New Jersey, and listed the jobsite under "Location of Job." I find that there is sufficient uncertainty here to accept parole evidence to determine the party's intent as to the scope of the unit. Diorio testified that, in signing the Agreement, Moran agreed that it would apply to the jobsite and future work as well, and told him of Respondent's work at Ferncliff, and that "he was going to use our people over there." Moran, on the other hand, testified that he signed the Agreement only because of the requirements of the Project Labor Agreement, and to enable the Union to cash the Respondent's fund payment checks, and Ambinder's testimony agrees with this. Moran further testified that he affirmatively told Diorio that Respondent "is not interested in becoming a union contractor and will not be a union contractor, and that we would fight any attempts to become a union contractor," and Cole supports Moran's testimony that there were discussions about the Union's difficulty cashing Respondent's fund checks because of their lack of a contract. I find that Moran's testimony, as supported by Ambinder and Cole, is more credible than Diorio's testimony. Prior to commencing work at the jobsite, Respondent was a nonunion contractor. Because of the Project Labor Agreement, Respondent was forced to recognize the Union for its employees at the jobsite, and the evidence (especially Ambinder's credible testimony) establishes that it did so reluctantly and with substantial prodding from the Union and Turner. It is difficult to believe that such a recalcitrant employer would "voluntarily" recognize the Union as the representative of all of its employees employed in the area. Rather, I find it more likely that Respondent realized that, due to the Project Labor Agreement, it would not be able to complete its work at the jobsite without signing a contract with the Union, and it did so, albeit, quite reluctantly.

Counsel for the General Counsel, in his brief, alleges that as Respondent was already bound by the Union's contract through the Project Labor Agreement, the only reason for signing the Agreement was to bind it at other work projects. However, as discussed above, there was credible testimony

that the Union was concerned with its inability to deposit Respondent's fund payment in the absence of a contract, and that was why Respondent executed the Agreement. Further, it was Moran who filled in the final line of the Agreement, which is otherwise ambiguous as to its scope, that the "Location of Job" was the jobsite. I therefore find that the Agreement only covered the employees at the jobsite, and as there is no evidence that the Respondent failed to apply the Agreement's terms to the employees employed at the jobsite, I recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) and (5) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

Having found and concluded that the Respondent has not engaged in the unfair labor practices alleged in the complaint, the complaint is dismissed in its entirety.

³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.